

THE HIGH COURT

MATRIMONIAL

[2021] IEHC 860

[2018 No. 56M]

BETWEEN

C.B.

PETITIONER

AND

C.M.

RESPONDENT

**EX TEMPORE JUDGMENT of Mr. Justice Jordan delivered on the 16th day of April
2021**

1. The Court has heard the submissions on behalf of both parties and it has considered the authorities submitted by both parties.

The Application

2. The application before the Court is in effect an application to allow the s.47 reports prepared by Dr. A.B. to be provided to the medical inspector appointed by this Court on the 13th December 2019. The appointment of the medical inspector was to carry out the function referred to in the Rules of the Superior Courts. Insofar as the request by the respondent for directions is concerned, it comes about because the medical inspector appointed requested sight of the s.47 reports in circumstances where it is her view that it is the best practice in psychiatry to have such information as is contained in those reports available to her before finalising her

report to the Court. I think it is important to say in that regard that it is apparent from Professor P.C.'s correspondence which is exhibited in the grounding affidavit that she is in a position to complete her report and has in fact indicated that she will complete the report and that it will be available without delay, even if she is not provided with the s.47 reports, but her view is that the best practice in psychiatry does cause her to make the enquiry and does place her in the position that she considers it best to have this information before finalising the report. In other words, she considers it desirable to see this information, to see this documentation.

3. The other point to make in relation to the documentation which is sought is that the s.47 report or reports came into being as a result of a s.47 Order which the Court made for a very specific purpose. In the ordinary course of events these s.47 reports contain a factual narrative obtained by Dr. A.B. and then her conclusion and recommendations as a result of the information she has received.

The Legal Position

The question arises, if it is appropriate in light of the Supreme Court authority and the High Court authority in particular which the Court has been referred to, whether it is appropriate or whether it is in accordance with those decisions that the reports be provided to her. In that regard, the respondent has referred to a number of authorities dealing largely with issues of discovery and while helpful in the round they are not directly relevant to the issue which is before the Court today. In the Court's view, the Supreme Court decision in *P.McG. v. A.F.* [2001] 1 I.R. 599 and the decision of O'Neill J. in *F.P. v. S.P.* [2002] 4 I.R. 280 - are very helpful and clear authorities - although it is the position that they are not dealing with exactly the same point but they are relevant and the views expressed by the Supreme Court and by O'Neill J. are very helpful.

4. In the first instance, it is useful to set out the relevant provision (section 47) of the Family Law Act 1995: -

‘47.— (1) In proceedings to which this section applies, the court may, of its own motion or on application to it in that behalf by a party to the proceedings, by order give such directions as it thinks proper for the purpose of procuring a report in writing on any question affecting the welfare of a party to the proceedings or any other person to whom they relate from—

(a) such probation and welfare officer (within the meaning of the Child Abduction and Enforcement of Custody Orders Act, 1991) as the Minister for Justice may nominate,

(b) such person nominated by the Child and Family Agency specified in the order as the Child and Family Agency may nominate, being a person who in its opinion is suitably qualified for the purpose, or

(c) any other person specified in the order.

(2) In deciding whether or not to make an order under subsection (1), the court shall have regard to any submission made to it in relation to the matter by or on behalf of a party to the proceedings concerned or any other person to whom they relate.

(3) A copy of a report under *subsection (1)* shall be given to the parties to the proceedings concerned and (if he or she is not a party to the proceedings) to the person to whom it relates and may be received in evidence in the proceedings.

(4) The fees and expenses incurred in the preparation of a report under *subsection (1)* shall be paid by such parties to the proceedings concerned and in such proportions, or by such party to the proceedings, as the court may determine.

(5) The court or a party to proceedings to which this section applies may call as a witness in the proceedings a person who prepared a report under *subsection (1)* pursuant to an order under that subsection in those proceedings.

(6) This section applies to proceedings—

- (a) under the Act of 1964,
- (b) under the Act of 1976,
- (c) under the Family Home Protection Act, 1976,
- (d) under the Act of 2018,
- (e) under the Status of Children Act, 1987,
- (f) under the Act of 1989,
- (g) under the Child Abduction and Enforcement of Custody Orders Act, 1991,
- (h) in relation to an application for a decree of nullity, and
- (i) under this Act.’

5. It is relevant to set out Order 70 of the Rules of the Superior Courts, section IX on Medical Inspection.

32. (1) In proceedings for nullity on the ground of impotence or incapacity, the petitioner shall, after the filing of the last pleading or, if no appearance has been entered or answer filed, after the expiration of the time allowed for entering an appearance or filing an answer (as the case may be), apply to the Master to determine whether medical inspectors should be appointed to examine the parties.

(2) Upon such application the Master may appoint two medical inspectors to examine the parties and report to the Court the result of such examination.

(3) At the hearing of any such proceedings the Court may appoint a medical inspector or two medical inspectors to examine any party who has not been examined or to examine further any party who has been examined, and to report to the Court the result of such examination.

(4) In proceedings for nullity on the ground that the marriage has not been consummated owing to the wilful refusal of the respondent to do so, either party may, after the filing of the last pleading, apply to the Master for the appointment of medical

inspectors to examine the parties and to report to the Court the result of such examination. Upon such application the Master shall appoint two medical inspectors and either of the parties shall be at liberty to submit himself for examination to one or both of the inspectors so appointed.

(5) The party on whose application medical inspectors have been appointed as aforesaid shall cause notice of the time and place of the examination to be given to the other party.

(6) Every examination shall be held at the consulting rooms of one of the medical inspectors so appointed as aforesaid or at some other convenient place to be specified in the order appointing them.

(7) A Registrar shall attend at the place fixed for the examination and call upon the solicitors for the parties to identify the parties to be examined. When the parties have been identified, the Registrar shall certify such identification in the Form No 8, and shall administer an oath in the Form No 9 to the medical inspectors who shall sign the same. The certificate of identification and oath shall be filed by the Registrar in the Central Office.

(8) Every report made under this rule shall be sent by prepaid registered post by the medical inspectors to the Master at the Four Courts, Dublin, and thereupon shall be filed in the Central Office, and either party shall be entitled to obtain a copy thereof upon payment of the prescribed fee.

6. It is necessary to consider each of the foregoing authorities briefly, in turn. In *P.McG. v. A.F.* the petitioner sought a decree of nullity. Arising from the application, the Master of the High Court appointed a psychiatrist to undertake a psychiatric examination of both parties and to prepare a report to the Court on the findings.

7. The petitioner in the case indicated to the assessing psychiatrist the existence of a number of third parties who could be in a position to give information vis-à-vis the psychiatric state of the respondent. Arising from this, the petitioner sought directions from the Court as to whether or not the medical inspect should interview those third parties.

8. The matter came before Budd J. in the High Court (see: *P.McG. v A.F.* [2000] IEHC 11) and he held that the assessor should interview the parties themselves and prepare a report for the Court. He held this Could be done without interviewing ‘other parties’.

9. The resultant appeal to the Supreme Court was dismissed in circumstances where it was held that nullity proceedings required the determination of an issue by a Court and were adversarial and not inquisitorial in nature. The Court also held that to allow the medical inspector interview persons other than the parties would be to endorse a preliminary hearing by the doctor.

10. In her judgment, Denham J. (with whom Geoghegan J. and Murray J. agreed), pointed out, at p. 606:

‘The medical evidence of the medical inspector is an important aspect of the hearing. However, the determination is a judicial function and the evidence should be tendered in accordance with the law and fair procedures.’

11. In respect of the decision of O’Neill J. in *F.P. v. S.P.*, the applicant had sought a decree of nullity from the Circuit Court. This was sought on the grounds, *inter alia*, that the parties lacked the capacity to enter into and sustain a normal lifelong marital relationship.

12. The Court appointed a consultant psychiatrist to examine the parties and subsequently made an Order for discovery allowing him sight of any relevant medical and psychiatric records in respect of the respondent in the nullity proceedings.

13. Following the making of that Order, the respondent appealed to the High Court. The basis for the appeal was that it would enable the medical examiner to rely on hearsay evidence

and that to allow the examiner to rely on the records of persons other than the parties to the proceedings was an extension of the role of the examiner which was impermissible as being in effect a usurpation of the judicial function.

14. When the appeal came on before O'Neill J., he dismissed it on the basis that to enable the medical examiner in nullity proceedings to properly discharge his functions and assist the Court, he should be given access to medical and psychiatric records in respect of the parties. This was inclusive of hospital admission notes, daily notes, discharge records and general practitioner records and notes.

15. He further held that, in an appropriate case, such an Order could encompass medical reports based solely on interview with an applicant or respondent, and scientific or clinical medical and/or psychiatric examinations including or culminating in the expert opinion of the author. Such access or discovery could not, however, have recourse to factual information from third parties, whether oral or in written form, or as reported by an intermediary, as such could constitute hearsay and might involve the medical examiner in an inquiry into facts, which may become removed from the reach of the trial judge hearing the case.

16. However, on the facts of the case before him, he held that there was no danger of the medical examiner conducting an inquiry of his own with third parties beyond the reach of the Court as what was sought was the provision of basic medical or psychiatric data which would not go so far as to draw on information from third parties.

17. The Court has also had regard to his *obiter* comments, set out at p. 289 as follows: -

‘The other important interest or principle at play and to be protected is the right of a party, in this case the applicant, to discovery of documents relevant to the issues in the suit so that he can advance his own case or damage the case of the other party.’

Discussion

18. It seems to this Court that ‘the evil’ to be avoided is to avoid firstly something akin to a pre-trial hearing and secondly to avoid the introduction of hearsay by the back door. Insofar as the first point is concerned, of course Ms. Jackson S.C. is correct that there wouldn’t be a pre-trial hearing because all Professor P.C. is looking for is a report, but on the second point it seems to me that Mr. Durcan S.C. is correct that the provision of the s.47 reports to Professor P.C. would fall foul and would be contrary to the reasoning of the Supreme Court in *P.McG. v. A.F.* and indeed contrary to the reasoning of O’Neill J. in *F.P. v. S.P.*

19. It seems to this Court that although it is perhaps only one of a number of important factors insofar as the decision is concerned, the expression by Professor P.C. in relation to the best practice of psychiatry mandating her as she saw it to enquire and try get the reports for the purpose she indicated, which I think she expressed was to have access to third party independent information, it seems to this Court that that purpose - that object - is unambiguous in terms of the basis for her inquiry and as I say does bring this case within the realms of the matters discussed in *P.McG. v. A.F.* and in *F.P. v. S.P.* insofar as the desirability of avoiding the contamination of the process is concerned.

20. I should also say that Ms. Jackson S.C. is correct when she refers to the routine nature in which medical records are made available following discovery or otherwise to experts retained by one side with a view to assisting them in arriving at the expert opinion which they are retained to provide to the Court. But it does not seem to me that the s.47 reports in this case fall into a similar category of documentation and it seems to me that that is readily apparent from the discussion in this regard in the judgment of O’Neill J. The desirability of avoiding the provision of reports such as these to the medical inspector is apparent in the judgment of O’Neill J. because in fact what you would have if the reports were furnished to Professor P.C., you would be furnishing the factual narrative provided to Dr. A.B. and recited in her reports and you would be providing an opinion and recommendations arrived at by her as a result of

her assessment and as a result of the factual narrative provided to her. It does not seem to this Court that the function of the medical inspector appointed pursuant to Court Order would be advanced in any event by those reports being provided to Professor P.C. Professor P.C. has a function to carry out a medical inspection in accordance with the Rules.

21. This is not a case which is creating an embargo on either side calling such evidence as they consider appropriate or necessary and cross-examining in such fashion as they consider appropriate or necessary in light of the information available to them at the hearing of the action. This is a case about ensuring that the process of medical inspection in accordance with the Court Order is carried out in line with the Supreme Court authority and High Court authority which I have referred to. It seems to the Court that it would involve an overreach of her position if Professor P.C. was to stray into the realm of interviews conducted by Dr. A.B. and conclusions arrived at and recommendations made by her. It seems to this Court that it is unnecessary that that should happen - and inappropriate that I would make the order that has been sought.

Decision

22. In the circumstances, I appreciate that the respondent felt it appropriate to seek directions from the Court in light of the request of Professor P.C. and I agree that it would have been inappropriate, even if it was possible, it would have been inappropriate for these reports to have been handed over without first seeking the direction of the Court in that regard. It would have been wrong. In the circumstances, I am granting a direction as sought by the petitioner - I am directing that the s.47 reports are not furnished to Professor P.C. in light of the Supreme Court authority and the High Court authority which accord with my own view of the matter. I consider that it would be incorrect and an overreach to allow Professor P.C. have the s.47 reports. I am also concerned, and it is somewhat ancillary, that s.47 reports which are ordered and prepared for the Court for a specific purpose would be utilised in the way in which has

been proposed - but that is not the primary basis for my decision. The basis for my decision is that it seems to me that an order refusing Professor P.C. access to the s.47 reports is an Order that I am required to make in light of the Supreme Court decision and in light of the High Court decision of O'Neill J, with which I agree.